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No. 82-633

In the Supreme Court of the United States

OCTOBER TERM, 1982

LEE S. LEICHTLING, D.D.S., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the affidavit submitted to the magistrate contained sufficient facts to support issuance of a search warrant for petitioner's home.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 684 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on July 19, 1982. A petition for rehearing was denied on August 10, 1982, and the petition for a writ of certiorari was filed on October 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on six counts of obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3), and on one count of possession of cocaine with intent to distribute, in

violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to three years' imprisonment on each of the first six counts, the sentences on counts I, II and III to run consecutively to each other but concurrently with the consecutive sentences on counts IV, V, and VI. He was sentenced to a ten year term of imprisonment and three years' special parole on Count VII, to run concurrently with the other sentences. The court of appeals affirmed (Pet. App. A-1 to A-9).

Petitioner was a dentist practicing in Desoto, Missouri. From July 1979 until his arrest on July 17, 1981, petitioner entered the Desoto Pharmacy each month and wrote a prescription for methaqualone in the name of Eleanor Harris (Tr. 63-68). Petitioner took the methaqualone with him and either paid for it at the time of the transaction or charged it to his account (Tr. 71-72). Petitioner told the pharmacist that Mrs. Harris was damaging her dental work by grinding her teeth and that the methaqualone was intended to control the grinding (Tr. 71). In fact, Mrs. Harris had not seen petitioner since 1978, had never had a problem with grinding her teeth, and had never received any methaqualone from petitioner (Tr. 81-82, 83-87).

During the period between May 1978 and July 1981 the pharmacist at the Rock Road Pharmacy in Desoto, Missouri, filled some 18 prescriptions for a total of 28.75 ounces of cocaine hydrochloride written by and for petitioner (Gov't Exh. 30; Tr. 91-99). Petitioner paid for each of these prescriptions with a personal check (Tr. 99-100). He indicated to the pharmacist that the cocaine was used in 5% solution as a mouthwash for root canal patients (Tr. 101).

Petitioner's secretary, his dental assistant, and his dental hygienist were unaware of these purchases or of any professional use of cocaine hydrochloride in petitioner's office (Tr. 113-115, 118-120, 125-126). Samples of mouthwash taken from petitioner's office contained no cocaine (Tr. 136,

143). Petitioner's 1981 renewal Drug Enforcement Administration (DEA) registration indicated that he did not intend to handle Schedule II narcotics, a category that included cocaine (Tr. 162, 165-166).

In May 1981, DEA agents were informed that the Rock Road Pharmacy had ordered two ounces of cocaine to be delivered to the pharmacy on May 22, 1981 (Tr. 6-7). On that date DEA agents observed petitioner enter the pharmacy, remain inside for about ten minutes, then emerge carrying a brown attache case that apparently contained two bottles, and drive toward his house (Tr. 7-8). On July 10, 1981, a DEA agent observed petitioner enter the pharmacy, obtain two bottles of cocaine, place the bottles in his attache case, drive to his house, and take the attache case into the house (Tr. 8-9, 169-172). As a result of the DEA agents' observations, a warrant was obtained for the search of petitioner's home.

Government agents went to petitioner's house on July 17, 1981, and informed him that they wished to discuss his cocaine purchases (Tr. 173). With petitioner's consent, the agents entered the home and then read him his *Miranda* rights (Tr. 173-175). Petitioner agreed to be interviewed and advised the agents that he used the cocaine in a mouth rinse but that none of his office employees was aware of it (Tr. 176-177). When asked about the cocaine he had purchased on July 10, petitioner agreed to turn it over to the agents; he obtained the two bottles, one partially empty, from his bedroom (Tr. 177-178, 180). At that point, petitioner was arrested and the search warrant for his house was executed. The search revealed a number of bottles of mannitol (a common dilutent for illegally-used cocaine), a number of empty bottles containing traces of cocaine, two bottles of methaqualone tablets, three scales (one with traces of cocaine), and various other equipment utilized in preparing

cocaine for illegal distribution (Pet. App. A-8 to A-9). A search of petitioner's car disclosed another scale and three bottles labeled "cocaine hydrochloride" (*id.* at A-9).

ARGUMENT

Petitioner's sole contention is that the affidavit (Pet. App. A-17 to A-19) in support of the search warrant did not establish the requisite probable cause to believe that contraband would be found in his house. The crux of petitioner's argument is that the affidavit — which states that the affiant saw petitioner obtain bottles of what was believed to be cocaine, place them in a brown vinyl case, and then "drive *to* [his] residence" (Pet. App. A-18; emphasis added) — does not specifically state that petitioner, after driving *to* his residence, went *into* his residence with the cocaine. This argument has no merit.[1]

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[1]As noted above, petitioner voluntarily surrendered the two bottles of cocaine that formed the basis of Count VII (possession of cocaine hydrochloride with intent to distribute) prior to the execution of the search warrant. Although various items discovered in the house provided additional evidence indicating intent to distribute (see Pet. App. A-8 to A-9), that intent was inferable from the bottles labeled "cocaine hydrochloride" found in petitioner's car, the scale found in petitioner's car, petitioner's numerous prescriptions for cocaine and methaqualone from the pharmacies, the samples of mouthwash seized from petitioner's dental office, the testimony of petitioner's patient for whom the methaqualone prescriptions had been written but who had never received any methaqualone, and the testimony of petitioner's employees who were unaware of any professional use of cocaine hydrochloride by petitioner or of any purchases of cocaine hydrochloride for professional use by petitioner. Thus, the validity of petitioner's conviction on Count VII does not depend on the adequacy of the affidavit and resulting search warrant. Since the sentence on Count VII was concurrent to and exceeded the sentences on all other counts, this Court may apply its discretionary concurrent-sentence doctrine and decline to review petitioner's case. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973).

The affidavit states (Pet. App. A-18):

> A subsequent surveillance established by the affiant and other DEA Agents revealed that on July 10, 1981, an additional shipment consisting of two one-ounce bottles of pharmaceutical cocaine to be delivered to the Rock Road Pharmacy at DeSoto, Missouri. On the same date, a surveillance of Rock Road Pharmacy revealed the subject Lee Leichtling to enter the pharmacy and receive two one-ounce bottles from the pharmacist and depart the store. At this time, surveilling agents observed the subject Lee Leichtling to place a pharmacy bag inside a brown vinyl case which appeared to be identical to the case he used on May 22, 1981; thereafter, the subject Lee Leichtling entered a blue Mercedes automobile which is registered to him, and proceeded to drive to the above-described residence.

Based in significant part upon his observation of these activities, the DEA agent averred that he had reason to believe that there was a quantity of cocaine in petitioner's house (Pet. App. A-20 to A-21).

This Court has held that "affidavits for search warrants * * * must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965). Here the DEA agent had personally observed the circumstances that led him to believe there was cocaine in petitioner's house. "[W]here [the underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *Id.* at 109. Moreover, the issuing magistrate may properly rely upon normal inferences to be drawn from the

facts presented to him. See, e.g., *United States* v. *McGlynn*, 671 F.2d 1140, 1146 (8th Cir. 1982), *United States* v. *Allen*, 588 F.2d 1100, 1106 (5th Cir.), cert. denied, 441 U.S. 965 (1979); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). And, as this Court consistently has recognized, "determination of probable cause [by a magistrate issuing a warrant] should be paid great deference by reviewing courts," *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); see also *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Aguilar* v. *Texas*, 378 U.S. 108, 111 (1964); *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960).

Here, petitioner was seen driving to his house with a large amount of pharmaceutical quality cocaine hydrochloride; he was not authorized to possess cocaine, which is not generally used in dental practice (Pet. App. A-18 to A-19). The affidavit's statement that petitioner drove "to" his home with an illegal substance clearly raises the reasonable inference that he took it *into* his home. Thus, this case differs from those upon which petitioner relies (Pet. 6-10). Unlike *United States* v. *Flanagan*, 423 F.2d 745 (5th Cir. 1970), and *United States* v. *Lockett*, 674 F.2d 843, 846 (11th Cir. 1982), where the courts noted that the contraband had not been observed in or near the premises to be searched, here the DEA agent saw petitioner drive to his home with cocaine.[2] Accordingly, the affidavit in this case would pass muster in all courts of appeals.

In any event, it is undisputed that the affiant actually observed petitioner take the cocaine into his house (Tr. 9). In these circumstances, it would have been unreasonable for the magistrate to conclude, as petitioner suggests (Pet. 8),

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[2]This case also differs from *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), for the reasons noted by the court of appeals (Pet. App. A-5).

that the cocaine was more likely to be located at the dentist's office. Both the trial court (Tr. 33) and the court of appeals (Pet. App. A-6) found that the affidavit stated facts sufficient to show probable cause. Further review by this Court of that purely factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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